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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

In re the Marriage of YANLI LI and HAO XU.

YANLI LI,
Respondent,
v.
HAO XU,
Appellant.

A124639

(Alameda County
Super. Ct. No. FF08391088)

In this marital dissolution action, the wife attempted to serve the husband with the dissolution petition in China without complying with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (Hague Service Convention). The family court denied the husband's motion to quash service and, when he did not respond to the petition, entered a default judgment against him. We reverse.

BACKGROUND

On June 5, 2008, Yanli Li petitioned for dissolution of her 2005 marriage to Hao Xu. On July 24, she filed a Judicial Council form proof of service of summons (Judicial Council Forms, form FL-115). The proof of service was signed by Jie Zhang, a Chinese resident, who declared that he served Xu with the petition for dissolution,

summons and blank response form in Wuhu, Anhui in the People's Republic of China.¹ On the form, a box by section 3(b) is checked, indicating that Zhang served Xu by substituted service. Section 3(b) includes the printed statement, "I left the copies with or in the presence of (*name*)" and provides a space for a reply. "Meizhen Cao" is written in that space and a box is checked indicating that Cao was a member of Xu's household and that Zhang had informed Cao of the general nature of the papers. All other spaces for responses in section 3(b) are left blank, including the spaces for the date and time of service and for the date when the process server "thereafter mailed additional copies (by first class, postage prepaid) to the respondent at the place where the copies were left . . . on (*date*)["]. Moreover, the preprinted form states, "A declaration of diligence is attached, stating the actions taken to first attempt personal service," but no such declaration is attached to the proof of service. A second proof of service in the record, which is not file-stamped, states that Zhang served the petition, summons, proof of service, response, and notice and acknowledgement of receipt on *Li* in Fremont, California by placing them in the Chinese postal service.

On August 21, 2008, Xu moved to quash service of process. Xu declared that he was a Chinese citizen and resident, and argued that under the Hague Service Convention the only valid method of serving a California judicial document on a Chinese resident is through the central authority designated by the Chinese government. At a September 29, 2008 hearing on the motion, at which Xu did not appear, the court said Xu was a resident of Hong Kong and commented, "He is . . . correct that Ms. Li did not serve pursuant to the requirements of the Hague Convention. [¶] Sadly, the Hague Convention does not apply in this case, as there are no children; custody and visitation are not at issue.

¹ On the proof of service form, Zhang wrote that Xu was served in "Anhui. Wuhu." We grant Xu's request that we take judicial notice of the fact that Wuhu is a city in the province of Anhui, which is in the People's Republic of China and is not part of Hong Kong, which is a special administrative region of the People's Republic of China. (Evid. Code, §§ 451, subd. (f); 459, subd. (a).) Li had an opportunity to oppose this request and did not do so. (Evid. Code, §§ 455, subd. (a); 459, subd. (c).)

Therefore, . . . his Motion to Quash is denied.” The same day, Li requested entry of default.

On October 8, 2008, Xu petitioned for a writ of mandate challenging the trial court’s order denying his motion to quash. (*Xu v. Superior Court* (A122869).) The court denied the petition on the basis of an inadequate record and because it appeared to be premature as Xu claimed not to have received a copy of the order denying his motion. (*Xu v. Superior Court* (Oct. 10, 2008, A122869) [nonpub. order].)

On October 17, 2008, Xu applied ex parte to dismiss the action for forum inconveniens.² That application was denied on November 17, 2008. In the order denying the application, the court wrote, “Respondent has 45 days to file a Response before default may enter.” The court entered a default judgment January 23, 2009. Xu appeals. Li has not filed a respondent’s brief.

DISCUSSION

The Hague Service Convention is a multilateral treaty formulated in 1964 “to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad. [Citations.] [¶] . . . [¶] Article 1 defines the scope of the Convention It says: ‘The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.’ 20 U.S.T., at 362. . . . This language is mandatory By virtue of the Supremacy Clause, U. S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies. . . . [¶] . . . [¶] The Convention does not specify the circumstances in which there is ‘occasion to transmit’ a complaint ‘for service abroad.’ . . . If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.” (*Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 698–700 (*Volkswagenwerk*).)

² Presenting such a motion does not constitute a general appearance which would concede the court’s jurisdiction. (Code Civ. Proc., §418.10, subd.(d).)

In California, subdivision (c) of the Code of Civil Procedure section 413.10, authorizes service of process “[o]utside the United States, as provided in this chapter . . . subject to the provisions of the . . . [Hague Service Convention].” With the exception of service by publication, the methods of service authorized by referenced chapter of the Code of Civil Procedure require “transmission of documents abroad and are therefore subject to the Hague Service Convention. [Citations.]” (*Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1135–1136.)

“The primary innovation of the Convention is that it requires each state to establish a central authority to receive requests for service of documents from other countries. 20 U.S.T. 362, T.I.A.S. 6638, Art. 2. Once a central authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law. Art. 5. The central authority must then provide a certificate of service that conforms to a specified model. Art. 6. A state also may consent to methods of service within its boundaries other than a request to its central authority. Arts. 8–11, 19.” (*Volkswagenwerk, supra*, 486 U.S. at pp. 698–699.)

The People’s Republic of China acceded to the Hague Service Convention in 1991. (Martindale-Hubbell Internat. Law Dig. (2006), p. IC-5, note 3a.) The instrument of accession designated a central authority pursuant to article 2, and disapproved the methods of service described in article 10 (service by mail and through judicial officers). (*Ibid.*; see Hague Service Convention, *supra*, 20 U.S.T. 361, arts. 2, 10.)³

The trial court’s finding that Xu was a resident of Hong Kong is unsupported by any evidence in the record before us. The undisputed evidence shows he was a resident

³ Xu’s request that we take judicial notice that the People’s Republic of China is a signatory of the Hague Service Convention and that it has disapproved the methods of service described in article 10 of the Convention is granted. (Evid. Code, §§ 452, subd. (f), 459, subd. (a).) Li had an opportunity to oppose this request and did not do so. (Evid. Code, §§ 455, subd. (a); 459, subd. (c).)

of an area of the People's Republic of China that is not part of the Hong Kong special administrative region.⁴

The trial court's ruling that the Hague Service Convention does not apply because child custody and child visitation were not at issue appears to be based on confusion between the Hague Service Convention and the Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 49 (reprinted at 51 Fed.Reg. 10494 (Mar. 26, 1986)). The Hague Service Convention is at issue here, and it applies to all civil or commercial cases where there is occasion to transmit a judicial or extrajudicial document for service abroad. In this marital dissolution matter, Li was required to serve Xu with the petition and summons. Because Xu resided and had to be served in the People's Republic of China, the Hague Service Convention applied.

It is undisputed that Li did not serve Xu through the central authority designated by the People's Republic of China pursuant to Article 2 of the Hague Service Convention. We also note that service was not properly performed even under California law, as there is no indication Li attempted to personally serve Xu before opting for substituted service, and there is no evidence the documents were mailed to Xu at the address where the documents were delivered. (Code Civ. Proc., § 415.20.)

DISPOSITION

The judgment is vacated. On remand, the superior court is directed to grant Xu's motion to quash service of summons. Xu to recover costs.

Bruiniers, J.

We concur:

Jones, P. J.

Simons, J.

⁴ A different instrument of accession to the Convention was issued with respect to Hong Kong. (See Martindale-Hubbell Internat. Law Dig. (2006), p. IC-5, note 3a.)